(3)

Supreme Court, U.S.
FILED
AUG 24 2000
CLERK

No. 99-1874

IN THE

Supreme Court of the United States

NAVEGAR, INC., *d/b/a* INTRATEC,
and
PENN ARMS, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF FOR THE UNITED STATES

RICHARD E. GARDINER*
Suite 404
10560 Main Street
Fairfax, Virginia 22030
(703) 352-7276
Counsel for Petitioners
**Counsel of Record*

BEST AVAILABLE COPY

15pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

The United States Fails To
Demonstrate That The Activities
Prohibited By Section 922(v)(1)
Substantially Affect Interstate Commerce 1

CONCLUSION 10

TABLE OF AUTHORITIES

CASES **Page**

United States v. *Beucklaere*,
91 F.3d 781 (6th Cir. 1996) 8, 9

United States v. *Franklyn*,
157 F.3d 90 (2nd Cir. 1998) 4

United States v. *Kenney*,
91 F.3d 884 (7th Cir. 1996) 6, 7, 9

United States v. *Knutson*,
113 F.3d 27 (5th Cir. 1997) 5

United States v. Lopez,
514 U.S. 549, 115 S. Ct. 1624 (1995) ..... *passim*

United States v. Morrison,
120 S. Ct. 1740 (2000) ..... *passim*

United States v. *Rambo*,
74 F.3d 948 (9th Cir. 1996) 8, 9

United States v. *Rybar*,
103 F.3d 273 (3rd Cir. 1996) 6

United States v. *Wright*,
117 F.3d 1265 (11th Cir. 1997) 5

STATUTES

18 U.S.C. § 922(a)(4) 8

18 U.S.C. § 922(o) 4, 5, 6, 7, 8

18 U.S.C. § 922(v)(1) 1, 2, 3, 9

ARGUMENT

The United States Fails To Demonstrate That The Activities Prohibited By Section 922(v)(1) Substantially Affect Interstate Commerce

1.a. The United States asserts that Petitioners "standing to sue is premised on Section 922(v)(1)'s likely effect on their commercial activities. See 103 F.3d at 1001 . . . ." (emphasis added) Brief for the United States in Opposition ("Opp.") 6. In fact, the court of appeals in the prior appeal (which presented only the question of standing) said nothing concerning the commercial nature *vel non* of Petitioners' activities. The court of appeals simply concluded that Petitioners had standing since "the Act in effect singles out [Petitioners] as its intended targets, by prohibiting weapons that only [Petitioners] make." 103 F.3d at 1000.

The United States further asserts that "federal regulation of . . . assault weapons is based in large part on evidence that the nationwide market for firearms renders purely local prohibitions ineffective. See Pet. App. 19a-21a." Opp. 7. Based on this assertion, the United States concludes that Section 922(v)(1) is a valid "regulation of non-economic activity." Opp. 7.

Recitation of the "evidence" that was before Congress does not rise to the level of the "independent evaluation of constitutionality under the Commerce Clause" required by *United States v. Lopez*, 514 U.S. 549, 561, 115 S.Ct. 1624, 1631 (1995), which neither the court of appeals nor the United

States have undertaken.

Indeed, in merely reciting testimony presented in congressional hearings, without offering an evaluation of the effect of the intrastate manufacture, transfer, and possession of "assault weapons" on interstate commerce, the United States, in effect, is contending that the question of whether an act of Congress substantially affects interstate commerce is a legislative question. Such a contention is directly contrary to this Court's view that the question of whether an act of Congress substantially affects interstate commerce is "'ultimately a judicial . . . question [which] can be settled finally only by this Court.' (citation omitted)." *Lopez*, 514 U.S. at 557, 115 S.Ct. at 1624, n.2. *United States v. Morrison*, 120 S.Ct. 1740, 1752 (2000).[1]

Implicitly conceding – as it must, in light of *Morrison* -- that the court of appeals erred in concluding that an activity need not be "economic" to be regulated under the Commerce Clause, the United States obtusely argues that Section 922(v)(1) *is* an economic regulation since, as "an absolute prohibition on the sale of specified firearms, [it] directly affects volume and price . . . ." Opp. 7.[2] But Section 922(v)(1) is not "an absolute

---

[1] The "evidence" referred to at Pet. App. 19a-21a was not, however, evidence of a "nationwide market" in "assault weapons," but rather evidence that then existing federal and state laws were being violated.

[2] The United States notes that the "fact that the statute serves non-economic ends . . . as well does not render it an invalid exercise of Congress's Commerce Clause powers."

prohibition on the sale of specified firearms"; it is a prohibition on the possession, manufacture, and transfer of the specified firearms. And, even if "sale" was synonymous with "transfer" and the "transfer" of the specified firearms "directly affect[ed] volume and price," the United States' argument nonetheless does not demonstrate that the "transfer" of the specified firearms *substantially affects* interstate commerce.

Moreover, the argument of the United States concerning the sale of the specified firearms fails to address the prohibition on the *possession* and *manufacture* of the specified firearms, let alone demonstrate that the possession and manufacture of the specified firearms *substantially affects* interstate commerce.

Having failed to offer an independent evaluation of the effect on interstate commerce of the intrastate manufacture, possession, and transfer of the specified firearms, the United States has not demonstrated that the activities prohibited by Section 922(v)(1) substantially affect interstate commerce. Thus, the United States has not shown that the court of appeals' decision does not conflict with decisions of this Court.

b. In a further effort to demonstrate that Section 922(v)(1) regulates economic activity, the United States contends that it is "designed to suppress the national market" in the specified firearms. Opp. 8. As authority for the Commerce Clause power to be used to justify a statute which "suppress[es] the national market," the United States refers not to any decision of this Court, but to eight court of appeals decisions

---

Opp. 7. Petitioners do not dispute this point.

relating to 18 U.S.C. § 922(o), all pre-dating *Morrison* and all of which are in conflict with *Morrison* and *Lopez*.

In *United States* v. *Franklyn*, 157 F.3d 90 (2nd Cir. 1998), the court upheld § 922(o), concluding that "Congress had a rational basis for finding that the machinegun trade 'substantially affects' interstate commerce." 157 F.3d at 96. Thus, the court did not make an independent evaluation of the effect on interstate commerce of the intrastate possession and transfer of machineguns as required by *Lopez* and *Morrison*. Moreover, nowhere does *Franklyn* demonstrate that the possession of a machinegun is an "economic activity," which, as *Morrison* makes plain and the United States now implicitly concedes, is the only class of activity that Congress may regulate under the Commerce Clause power. Indeed, *Franklyn* correctly observed that "possession of a single machinegun is neither interstate in nature nor commercial . . . ." 157 F.3d at 96.[3] Clearly, since possession of one machinegun is not commercial, possession of more than one is not commercial either.

---

[3] The court went on to explain why it did not matter to the court that "possession of a single machinegun is neither interstate in nature nor commercial": "Congress is authorized to regulate individual instances of purely intrastate activity where the cumulative effect of such activity would substantially affect interstate commerce." 157 F.3d at 96. This view of congressional power is clearly in error under *Morrison* and *Lopez* since it must be intrastate *economic* activity which is regulated. Thus, it *did* matter whether possession of a single machinegun was commercial; since it was not, Congress could not regulate it under the commerce power.

United States v. *Wright*, 117 F.3d 1265 (11th Cir. 1997) upheld § 922(o) because "the connection between the elimination of the lawful demand for machineguns and the manufacture, importation, and interstate transfer of these products is obvious and direct." 117 F.3d at 1270. The court did not, however, explain how the intrastate transfer or possession of machineguns "substantially affected" interstate commerce or how the intrastate possession of machineguns was economic activity. Rather, it simply stated, contrary to *Morrison* and *Lopez*, that "Congress had a rational basis to determine that a total ban on machineguns would have a substantial effect on interstate commerce." *Id.* Moreover, *Wright* entirely ignored the key point in *Morrison* that the United States now concedes: that the regulated activity must be "economic."

In *United States* v. *Knutson*, 113 F.3d 27 (5th Cir. 1997), the court first held that the issue before it was whether "Congress could rationally conclude that § 922(o) effectively regulates interstate trafficking in machineguns . . . ." 113 F.3d at 29. In light of *Morrison and Lopez*, rational basis review was not appropriate.[4]

---

[4] *Knutson* also baldly concluded that "[i]t is obvious 'to the naked eye' that the transfer and possession of machineguns has a substantial effect on interstate commerce." 113 F.3d at 30. To support this "obvious" fact, the court pointed to what it characterized as "extensive legislative history . . . ." 113 F.3d at 30. A review of the legislative history cited by the court reveals, however, nothing related to the effect on interstate commerce of the transfer and possession of machineguns.

United States v. *Rybar*, 103 F.3d 273 (3rd Cir. 1996) concluded, without any foundation, "that 'possession and transfer' of a machinegun is an economic activity that Congress could have believed would be repeated elsewhere and thereby substantially affect interstate commerce." 103 F.3d at 282. Once again, the court applied a rational basis test, in direct conflict with *Morrison* and *Lopez*. Moreover, it is readily apparent that possession of a machinegun is not an "economic" activity as understood by *Lopez*. As with mere possession of a firearm on school grounds, mere possession of a subset of firearms has nothing whatever to do with commerce or economic enterprise.

In *United States* v. *Kenney*, 91 F.3d 884 (7th Cir. 1996), the court found § 922(o) to "recognizable as 'an essential part of a larger regulation of economic activity . . . .' *Lopez*, 115 S.Ct at 1631." 91 F.3d at 890. To reach that conclusion, the court observed that the possession of machineguns "is much like the possession of wheat" in *Wickard* v. *Filburn*, 317 U.S. 111, 63 S.Ct. 82 (1942). 91 F.3d at 890. Thus, according to *Kenney*, there was "a rational basis to regulate the local conduct of machine gun possession . . . to effectuate [the statute's] purpose of freezing the number of legally possessed machine guns . . . ." *Id.* The court's argument fails on four counts.

First, a rational basis for a statute is not adequate under *Morrison* and *Lopez*. Second, the analogy to *Wickard* does not hold up. *Wickard* was described in *Lopez* as follows:

> Roscoe Filburn operated a small farm in Ohio . . . . It was his practice . . . to sell a portion of the crop, to feed part of it to poultry and

> livestock on the farm, to use some in making flour for home consumption, and to keep the remaining for seeding future crops. . . . The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained.

115 S.Ct at 1630.

Thus, it was not the *possession* of wheat by farmers that affected interstate commerce; rather, it was the *sale and consumption* of the wheat that affected "the volume of wheat moving in interstate and foreign commerce . . . ." Consequently, § 922(o) cannot be analogized to the statute in *Wickard*. Third, *Kenney* does not identify the "economic activity" of which the regulation of the possession of machine guns is "an essential part . . . ." In fact, there is nothing in § 922(o) which even suggests, much less establishes, that it is a part (to say nothing of an essential part) of a larger regulation of economic activity. Finally, the purported congressional "finding" that *Kenney* relies on to demonstrate that § 922(o) does not "represent[] a sharp break with the long-standing pattern of federal firearms legislation" (*Lopez*, 115 S.Ct. at 1632) related solely to "federal control over firearms licensing for dealers . . . ." 91 F.3d at 890. Thus, the "finding" does not "'speak to the subject matter'" (*Lopez*, 115 S.Ct. at 1632) of § 922(o), which prohibits possession and transfer of machineguns by any person and certainly does not speak to the relationship of the possession or transfer of machineguns to interstate

commerce.[5]

United States v. *Beucklaere*, 91 F.3d 781 (6th Cir. 1996) upheld § 922(o) because "[m]achineguns travel in interstate commerce, posing a threat to law enforcement, which has a disruptive effect on interstate commerce." 91 F.3d at 785. § 922(o), however, regulates intrastate possession and transfer of, not interstate travel with, machineguns. Moreover, the court's conclusion that there was a "disruptive effect on interstate commerce" piles unexpressed inference upon inference, a process *Lopez* expressly declined to adopt. Finally, even if the court's reasoning could be comprehended, it nonetheless does not conclude, after an "independent evaluation," that there was a substantial effect on interstate commerce.

United States v. *Rambo*, 74 F.3d 948 (9th Cir. 1996) focuses on the statement in *Lopez* that Congress may "attempt to prohibit the interstate transportation of a commodity through the channels of commerce . . . ." 115 S.Ct at 1630.[6] The statutes to which *Lopez* was referring involved express prohibitions on the movement of goods or persons in interstate commerce. To read *Lopez* as holding that regulation of the

---

[5] The so-called "finding" was not a finding by Congress at all; rather, it was a proposed finding set forth in a Senate bill which never became effective.

[6] In § 922(o), Congress was not attempting "to prohibit the interstate transportation of a commodity through the channels of commerce" since § 922(a)(4) already prohibited the interstate transportation of machineguns.

channels of interstate commerce encompasses statutes which do not have an express interstate nexus, such as § 922(o), misapplies *Lopez* not only by expanding what *Lopez* said about regulation of the channels of interstate commerce, but by confusing the "substantially affects interstate commerce" category of the Commerce Clause power with the channels of interstate commerce category.[7]

2. The United States argues that, "where commercial gun manufacturers challenge regulation of their firearms production, the nexus to interstate commerce is 'visible to the naked eye' . . . ." Opp. 10. Even if there is an obvious nexus between Petitioners' activities and interstate commerce, the issue in evaluating whether Congress has overstepped its Commerce Clause power is whether, as a matter of law, the activities regulated by Section 922(v)(1) substantially affect interstate commerce. As *Lopez* made absolutely plain, 514 U.S. at 559, 115 S.Ct. at 1630, a mere effect on interstate commerce is insufficient; there must be a *substantial* effect on interstate commerce. Thus, the bare existence of a nexus between Petitioners' activities and interstate commerce is inadequate to justify Section 922(v)(1).

After referring to the existence of a nexus to interstate commerce, the United States nonetheless goes on to acknowledge expressly that the Commerce Clause mandates that there be a substantial effect on interstate commerce of

---

[7] The Seventh Circuit expressly rejected the reasoning of *Rambo* and *Beucklaere* as to the channels of commerce category. *United States* v. *Kenney*, 91 F.3d 884 (7th Cir. 1996).

intrastate activity and asserts that the "legislative record fully supports Congress's view that the manufacture and transfer of firearms have substantial interstate commercial effects." Opp. 10.[8] This assertion fails to justify § 922(v)(1): "'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" (citations omitted). *Morrison*, 120 S.Ct. at 1751. Moreover, that Congress may have made a "common-sense judgment" (Opp. 10) no more justifies § 922(v)(1) than the existence of a legislative record.

CONCLUSION

The Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.[9]

---

[8] Even if the legislative record fully supports Congress's view that the manufacture and transfer of firearms have substantial interstate commercial effects, this does not address the prohibition on possession of the specified firearms.

[9] At a minimum, the Court should grant the Petition and remand the case to the Court of Appeals for reconsideration in light of *Morrison* and the concession of the United States that activity must be economic to be subject to regulation under the Commerce Clause.

RICHARD E. GARDINER*
Suite 404
10560 Main Street
Fairfax, Virginia 22030
(703) 352-7276
(703) 359-0938 (fax)
Counsel for Petitioners

*Counsel of Record